

157 Super Appeal Brief
7/23/03
[Signature]

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In the Patent Application of

Richard E. VOGEL and
Timothy J. FOLTZ.

Group Art Unit: 3727

Serial No.: 09/681,099

Examiner: Merek, Joseph C.

Filed: January 4, 2001

For: CONFECTION CUP ASSEMBLY

REQUEST FOR REINSTATEMENT OF APPEAL

Commissioner of Patents
Box 1450
Alexandria, VA 22313-1450

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Sir:

Applicants (Appellants) request reinstatement of the appeal under 37 CFR §1.193(b)(2).
A supplemental appeal brief accompanies this request.

On October 3, 2002, Appellants appealed the rejection of claims 1-17, 19-30, 32, 34-38, 42, 43, 45, 46, 52, and 81. Appellants' final appeal brief was filed on April 2, 2003. In the paper mailed June 20, 2003, the Examiner reopened prosecution after the appeal has been filed and issued a non-final restriction requirement. Under 37 CFR §1.193, Appellants have two options, to-wit: (1) file a reply under 37 CFR §1.111 or (2) request reinstatement of the appeal. Appellants request reinstatement of the appeal.

It is noted that the Examiner has entered only a requirement for restriction. There is no new ground of rejection in the paper mailed June 20, 2003. This is contrary to MPEP §1208.02, which states:

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The examiner may, with approval from the supervisory patent examiner, reopen prosecution to enter a new ground of rejection after appellant's brief or reply brief has been filed.

There is no authority, either in the rules or in the MPEP, for the Examiner to enter a restriction requirement after appeal, at least without also entering a new ground of rejection. Moreover, entry of a requirement for restriction at this late date is clearly inappropriate. The Examiner has already *twice* examined the claims he seeks now to restrict.

The examiner should make a proper restriction requirement as early as possible in the prosecution. Before making a restriction requirement after the first office action on the merits, the examiner will consider whether there will be a serious burden if restriction is not required. MPEP §811.

Unquestionably, there will be no serious burden if restriction is not required, because all of the claims have already been examined. No further searching will be required. There is nothing in the amendments entered for appeal that establish a serious burden.

The Examiner should have either replied to the appeal brief or entered a new ground for rejection. He did neither. The appeal should be reinstated and, unless there is a new ground of rejection that warrants reopening prosecution, the time for the Examiner's answer has passed.

Respectfully submitted,

RICHARD E. VOGEL AND TIMOTHY J. FOLTZ

Dated: 16 July 2003

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